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May 29, 1996

Office of the Secretary
Federal Communications Commission
1919 M Street N.W., Room 222
Washington, D.C. 20554

RE: CC Docket No. 96-98

Dear Secretary:

Enclosed please find the original and sixteen (16) copies of **Reply Comments of the Joint Consumer Advocates** in the above-referenced docket. Please stamp the extra copy "filed" and return it in the enclosed self-addressed and prepaid envelope.

Thank you for your assistance in this matter.

Sincerely,

Martha S. Hogerty
Missouri Public Counsel

MSH/bjr

Enclosures

cc: Janice Myles, Common Carrier Bureau
International Transcription Services, Inc.

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MAY 30 1996

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C.**

In the Matter Of:	)	
	)	
Implementation of the Local Competition	)	CC Docket No. 96-98
Provisions in the Telecommunications Act	)	
of 1996.	)	

**REPLY COMMENTS OF THE
JOINT CONSUMER ADVOCATES**

By their counsel:

Martha S. Hogerty (Mo. Bar #30052)
Public Counsel, State of Missouri

On behalf of:
Joint Consumer Advocates

DATED: May 30, 1996

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SUMMARY

The state consumer advocates of Missouri, Iowa, Florida, District of Columbia, Maryland, Colorado, Delaware, Washington, Pennsylvania, California, Maine, and Indiana (Joint Consumer Advocates) believe that states have primary authority to mediate, arbitrate, and set just, reasonable, and nondiscriminatory rates for interconnection agreements. Thus, the FCC, through its rulemaking authority to implement Section 251, should establish broad guidelines based on its interpretation of statutory requirements that will allow the states to implement those requirements in a manner appropriate to their circumstances. The guidelines should ensure that the new entrants are placed on an equal footing with the incumbent local exchange providers.

The FCC should establish a minimum list of unbundled elements and encourage the states to expand the list in recognition that the elements require a high degree of unbundling. Unbundled elements and interconnection points should be presumed technically feasible if they are currently being offered, and any claims of nonfeasibility should be suspect, with the burden of proof placed on the incumbent.

Pricing of unbundled elements should be based on total service long-run incremental costs and a reasonable share of the joint and common costs. Resale restrictions should be limited, and it is appropriate to net avoided costs against any legitimate costs to provide resale so long as the burden of

proof is on the incumbent. Finally, Bill and Keep for reciprocal compensation should be required on an interim basis.

It would be unlawful and inappropriate to adopt an imputation rule requiring that local rates be raised so that the sum of the unbundled elements (loop and port) equal the retail local service rate. This proposal is based on the erroneous assumption that local service is subsidized. Further, the unbundled loop is not equivalent to local service.

JCA request the Commission to firmly reject any claim by the LECs that they are entitled to recover stranded embedded costs. This view has no legal basis. JCA have set forth in the comments case law that clearly establishes the principle that utilities do not have a constitutional right to a return on all prudent investments and that utilities are not entitled to recover costs that become uneconomic due to competitive pressure.

Finally, JCA suggest to the Commission that the access charge structure is not a proper subject for this docket.

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REPLY COMMENTS OF THE
JOINT CONSUMER ADVOCATES

I. INTRODUCTION.

Joint Consumer Advocates (JCA) welcome the opportunity to comment to the Federal Communications Commission (FCC or Commission) on the implementation of the Telecommunications Act of 1996 (the Act). In these reply comments, JCA address the federal/state role in implementing the Act, pricing standards, unbundling, resale, and stranded cost recovery.

II. THE FCC SHOULD ESTABLISH BROAD GUIDELINES PURSUANT TO SECTION 251 TO ASSIST THE STATES TO PERFORM THEIR STATUTORY DUTY TO IMPLEMENT SECTION 252 OF THE ACT.

A. <u>The states have primary authority to mediate, arbitrate, and set just, reasonable, and nondiscriminatory interconnection agreements</u>.

The initial comments have taken various positions on the Commission's preemptive power over the states. NARUC has taken the position that the FCC's role with respect to the implementation of local competition is limited to rulemaking authority expressly set forth in Section 251: number portability; resale regulation; defining unbundled network elements; and issues regarding the North American Numbering Plan. NARUC argues that preemption is only permitted under Section 251(e)(5) if the states will not act. Other commenters support very prescriptive and preemptive FCC rules with respect to pricing and the establishment of the Section 251 and Section 252 requirements. NCTA and MCI go so far as to propose that a national benchmark price for the unbundled elements be established.

JCA believe that the statute requires a middle course. Section 251(d) clearly requires the Commission to establish regulations within six months of enactment to implement the requirements of Section 251. Section 251 sets forth the obligations of local exchange carriers (LECs) for interconnection. With respect to incumbent local exchange carriers, Section 251 sets out certain duties to ensure that local competition can take place. The incumbent LECs have a duty to negotiate in good faith interconnection agreements with other carriers; they have a duty to interconnect at technically feasible points within the network; they have a duty to provide access to unbundled network elements; and they have a duty to offer for resale their services at wholesale rates. Section 252 sets forth the states' duties with respect to implementing the local competition interconnection agreements. The statutory scheme provides for voluntary negotiations for interconnections subject to state mediation, arbitration, and state approval of the agreements. The pricing standards to be applied by the states are set forth in Section 251(d). Only if the state fails to perform its responsibility may the Commission preempt the states and take over the state duties. Section 252(e)(5). Reading the two sections together, it is reasonable to conclude that the states have primary authority to mediate, arbitrate, and set just, reasonable, and nondiscriminatory interconnection agreements, including the setting of rates for those agreements. Nonetheless, the FCC is charged with establishing rules to implement Section 251; thus, this section must be interpreted to give the FCC the power to interpret the statute and promulgate rules to ensure that the incumbent local exchange companies' duties with respect to negotiation, interconnection, unbundling, and resale set forth in Section 252 are carried out. Given the express provisions calling for state approval, the proper course for the Commission is to establish broad guidelines concerning the interpretation of the statutory requirements, while providing the states with considerable freedom to use their best judgment in implementing these requirements in a manner that is most appropriate to their circumstances. The federal guidelines should be aimed at ensuring that new entrants have equal bargaining power with the incumbents.

B. <u>The congressional decision to place primary responsibility on the states is reasonable as a matter of policy</u>.

Detailed, highly-restrictive national rules would be premature and harmful to consumers. A middle ground should be established by FCC rules, at least initially, allowing reasonable scope for variation by states. The Commission would lose the full benefit of state judgments concerning many complex issues if it were to tightly restrict their range of discretion. If different states reach different conclusions (which is likely), this will not only allow for variation in accordance with varying conditions, it will also allow for a useful degree of experimentation. If some state approaches prove to be more successful than others in attracting entry and advancing the public interest, other states are likely to modify their policies in order to take advantage of what has been learned in other jurisdictions. Ultimately, if some states adopt policies which are demonstrably inconsistent with the Act and incompatible with effective competition, the Commission can correct the problem through carefully targeted preemption on a remedial basis.

The Commission should not interpret the prior record as indicating that most states will be slow to implement competition. The Act has fundamentally changed conditions and made it easier for states to open their markets to competition. The MFJ's prohibition of BOC entry into the interLATA toll markets may have discouraged many state commissions from promoting local competition, on the theory that it was unfair to allow competition in local markets when there was no possibility of reciprocal competition by the RBOCs. Furthermore, many state commissions and legislatures, anticipating the passage of a federal telecommunications reform act, decided to wait until they could adopt policies which fit within a national framework. The wait was prolonged, but it coincided with growing support for increased competition in nearly every jurisdiction.

Thus, the slow emergence of competition should not be misinterpreted by the Commission as reflecting a reluctance on the part of the states to move toward effective competition. An examination of the voluminous public record on competitive issues in state after state will clearly reveal a shared interest in achieving the worthy goals of fair and effective competition. Now that Congress has set the stage, the states are eminently capable of rapid and decisive action, working in partnership with the Commission. There is no evidence that they are unwilling or unable to carry out their responsibilities under the Act.

Several factors mitigate against highly-detailed, restrictive rules. First, the local exchange markets are just that--local. There is much less need for nationwide uniformity in local exchange competition than there was in long distance competition, which inherently tended to involve the entire nation. Local telephone market conditions can vary from region to region, state to state, and even county to county. A narrowly drawn set of national rules or standards would obscure this inherent variation and remove one of the competitive benefits that small local and state carriers can provide. While inflexible national rules may work to the advantage of national carriers, they work to the disadvantage of smaller local and regional carriers. The latter firms, some of which might target rural areas, will have a greater opportunity to prosper, with innovative service offerings and business plans that are carefully tailored to fit local conditions, if regulatory policies are allowed to differ from state to state, based upon local circumstances. If the Commission imposes an overly restrictive set of national rules, the local exchange industry will tend to be unduly nationalized to the advantage of national carriers and the detriment of consumers, who would benefit from a more complex industry with a large number of local, state, and regional carriers, as well as nationwide carriers.

As experience in other industries has shown, low-cost national advertising media can provide a competitive advantage for national chains, while variations in tastes and preferences across geographic and demographic lines can provide a benefit for smaller local and regional businesses. Highly restrictive, "one-size-fits-all" nationwide regulations will effectively override many of the factual and policy differences which arise in different locations, effectively obliterating one of the competitive benefits that local and regional carriers potentially provide to consumers. If an artificial uniformity is imposed on the market by the Commission, thereby converting an inherently local market into a uniform nationwide market, the competitive benefits of these smaller firms will be weakened or destroyed.

From an economic perspective, restrictive national rules primarily benefit national carriers, since they allow these carriers to adopt uniform, nationwide business plans which allow them to maximize their economies of scale. However, variations in state rules allows small carriers to adopt to local conditions, to tailor services and business plans to local rules, and to innovate in ways that are most compatible with local conditions. On balance, the public interest is best advanced by a diversity of rules, which is more compatible with a diversity of competitors than strict national standards, thereby encouraging a greater degree of innovation and more effective competition.

Furthermore, local exchange competition does not have an extensive track record. We are, in fact, heading into the unknown. In such a circumstance, it is far better to have 50 expeditions than just one. Fifty explorers can cover more ground than one or two and bring back more information in a shorter time. Since mistakes are inevitable, diverse experiments reduce the associated risks. A statewide mistake has less impact than a national mistake. Since the optimal solution is unknown, diverse rules subject to federal guidelines are more likely to result in effective competition than a monolithic national approach.

III. THE FCC SHOULD ESTABLISH A MINIMUM LIST OF UNBUNDLED ELEMENTS, AND THE STATES SHOULD EXPAND ON THAT LIST BASED UPON THE FACTS PRESENTED IN PARTICULAR CASES BEFORE THEM.

JCA agree with the comments that suggest that the unbundled elements set forth in the NOPR at paragraphs 94, 98, 104, and 107 should be established as a minimum standard. This will avoid fruitless debate over unbundled elements that obviously must be unbundled under the terms of the Act. Any attempt to develop an exhaustive list of unbundled items would not be useful and could easily turn into a ceiling on the degree of unbundling. The primary goal of the Commission's rulemaking in this area should be to encourage competitive entry by local and statewide carriers, not to standardize facilities and procedures.

The states should recognize that a high degree of unbundling is required by the Act and should require further unbundling when it is desirable to ensure the development of competition. Based on the comments, there is a dispute as to the desirability of sub-loop unbundling. This question and other similar issues should be resolved at the state level based upon the evidentiary facts presented.

IV. AN UNBUNDLED ELEMENT OR INTERCONNECTION POINT IS PRESUMED TECHNICALLY FEASIBLE IF IT IS CURRENTLY BEING PROVIDED BY LECs. IN ADDITION, THE ONE CLAIMING THAT AN UNBUNDLED ELEMENT OR INTERCONNECTION POINT IS NOT TECHNICALLY FEASIBLE HAS THE BURDEN OF PROOF.

JCA agree with other comments that unbundling should be limited only by what is technically feasible. Unbundling is in the public interest, and the special interest of incumbent carriers should not control. Claims that unbundling is not economically feasible or would impair network reliability should be suspect. The one claiming that unbundling is not technically feasible must bear the burden of proof on that issue. Finally, an unbundled element or an interconnection point should be presumed technically feasible if it is currently being provided by any local exchange company.

V. PRICING UNBUNDLED ELEMENTS.

As noted above, the Commission has authority to promulgate rules to implement Section 251 of the Act. Section 251(c)(2)(D) and 251(c)(3) require that interconnection and unbundled access be provided at rates, terms, and conditions that are just, reasonable, and nondiscriminatory. Thus, it is reasonable for the Commission to provide guidance to ensure appropriate pricing methodologies are met. However, the Commission does not have authority to set local interconnection and unbundled prices. That authority has been reserved to the states in Section 252. Thus, while the Commission may provide guidance as to costing, it may not set a specific price.

It follows, therefore, that the Commission should not set a national benchmark price. The appeal of this approach for the Commission is understandable. A national price could limit the scope of inquiry within states, hence saving valuable time and effort This savings would extend beyond the Commission to all other interested parties. However, one needs to ask if it is possible to find prices that could achieve these desired goals without prejudicing a wealth of cost information potentially available for each state, but which cannot possibly be submitted to the Commission in time to be useful.

Even a cursory review of state proceedings involving economic cost studies reveals heated debates, reflecting a diversity of opinion, and a high degree of complexity and detail which is necessary to resolve the debate. Consider, for example, the recent determination by the Washington Utilities and Transportation Commission (WUTC) in Washington and Transportation Commission v. US West Communications, Inc., Docket No. UT-950200, April 11, 1996 (US WEST). In that decision, the WUTC found that the incremental cost of residential basic local exchange service is $4.42 per month. US WEST Order at 89-90. In that same proceeding, US WEST claimed the relevant economic cost was several times higher. Reconciling these widely disparate views of cost was a complex process, requiring an evidentiary hearing. The FCC does not hold evidentiary hearings, and therefore does not have the practical ability to perform the kind of review necessary to establish rates.

Any serious attempt by the FCC to determine a price that could stand the test of contested hearings and court challenges would surely entail a far more extensive data-gathering effort, to ensure that it can fairly and accurately be applied to all 50 states. It simply is not realistic for the Commission to undertake such a massive effort at this time, given all the other pressing matters which must be resolved in the near future in order to implement the Act. The state commissions are better prepared to deal with this massive array of information, since each can focus on the costs which are present in its particular jurisdiction.

Aside from the practical problems, JCA question the value of undertaking such an exercise. A national price would not allow the states the flexibility to deal with the widely varying conditions within their borders. For instance, depending on the model and the state, the cost of an unbundled loop can range from a couple of dollars to $100.00 a month, simply depending upon the loop lengths, customer density, customer mix, and other characteristics of each wire center. (If intra-wire center cost variations are considered, an even wider range is revealed). An estimate based on a long-run costing approach based on state specific data will produce results covering a wide range.

If the Commission were to establish a national price, the states would be forced to ignore much of the cost information they receive, or be forced to adopt a high degree of averaging (blending high cost exchanges with low cost ones) in an effort to stay within the prescribed bounds. While this may reduce the cost and complexity of evidentiary proceedings conducted in each state, it would almost undoubtedly result in undesirable and unintended consequences if the states are forced to engage in a higher degree of averaging than would otherwise be desirable

JCA agree with the majority of comments that economic costs should be the starting point for setting the price for unbundled elements. An economic costing approach is compatible with both price cap regulation and other forms of economic regulation Many states that rely upon traditional rate base regulation to control overall profit levels use economic cost information (e.g., marginal or incremental cost) to resolve rate design issues, including the appropriate pricing of services offered to competitors. Most economic studies submitted to state regulators estimate some form of long-run incremental or marginal cost, or at least claim to do so. However, other forms of economic costs, including long-run average cost and short-run incremental or average cost, are also relevant and are sometimes considered in state proceedings.

JCA believe that marginal (or incremental) cost is generally superior to average cost as the more useful and appropriate basis for pricing unbundled network elements. First, marginal cost is the type of cost that is most significant in explaining the outcome of competitive markets. In a purely competitive market, prices will move to marginal cost. Second, where prices are appropriately related to marginal cost, economic efficiency is encouraged. This follows from the fact that society saves the marginal cost (not the average cost) when a customer decides to forgo consumption, and society incurs the marginal cost when a customer decides to engage in consumption. Third, incremental or marginal cost is particularly useful in evaluating claims by the incumbent carriers concerning any alleged economic hardship, any taking of property without due process, or any failure to comply with the provisions in the Act which allow the carrier to recover the cost of unbundled network elements plus a reasonable profit. This follows directly from the very nature of marginal or incremental cost. It reflects the change in the incumbent carrier's total costs which will result from providing (or not providing) the item in question. Thus, it allows a narrow focus on the direct economic impact on the incumbent's total cost structure if it is forced to provide an unbundled network element to a competitor, as contrasted with the incumbent situation, if the competitor installs its own network, or acquires the item in question from another carrier. In other words, marginal or incremental cost is focused on the margin of decision making. It allows clear answers to difficult questions concerning whether or not an incumbent carrier is unduly burdened by the requirements of the Act that it provide unbundled network elements to competitors.

For these reasons, JCA urge the Commission to allow the states to rely upon incremental or marginal cost information in setting rates for unbundled network elements. As noted by the WUTC, relying on incremental cost alone does not answer all pricing questions.

JCA further agree with the majority of comments that the price should be no lower than total service incremental cost plus a reasonable share of joint and common costs. Total service long-run incremental cost is defined as:

> . . . the firm's total cost of producing all its services including the service (or group of services) in question, minus the firm's total cost of producing all its services EXCEPT the service (or group of services) in question. Thus, it is a particular form of long run incremental cost (LRIC), in which the specific increment is the entire volume of output of a particular services, while all other services remain unchanged. This concept can be applied to either the long run, or the short run. However, it is usually applied in a long run context, and thus the acronym TSLRIC.

In a pure TSLRIC approach, joint costs should be excluded, since those costs are necessary for the production of the other services and would still be incurred in the total absence of the service in question. However, since this claim can equally well be made for every other service offered by the firm, it is clear that the application of TSLRIC studies to issues of cost recovery and pricing will require that prices be set above TSLRIC, to ensure recovery of the firm's <u>joint</u> costs. Similarly, if the analyst excludes <u>common</u> costs from the

TSLRIC study, it should be understood that recovery of these costs will require application of a markup above TSLRIC for pricing purposes.

Joint and common costs are a real cost of providing service. Therefore, it is important that all services bear some share of joint and common cost. The fact that all services provide a contribution to joint and common cost does not suggest a subsidy. It is very important that the subsidy confusion be put to rest. Contribution merely means the price includes a share of joint and common cost. It is legitimate and necessary to recover joint and common cost. On the other hand, if a service provides a subsidy, it is priced above its stand alone cost. It is clear that the terms "contribution" and "subsidy" are not synonymous.

VI. RESALE.

The statute is clear. Section 252(d)(3) requires state commissions to determine wholesale rates on the basis of retail rates less avoided costs. JCA support the comments of the Bell Operating Companies that it is appropriate to net avoided cost against any legitimate cost to provide resale so long as the incumbent is subject to strict burden of proof standards. We agree that it is appropriate to restrict reselling residential to business customers, but believe other restrictions should be avoided. In particular, we agree with the potential competitive local exchange companies that restrictions should not be imposed on discounts and promotions at this time.

VII. THE SUM OF THE UNBUNDLED ELEMENTS DOES NOT NEED TO BE EQUAL TO THE RETAIL RATES.

JCA agree with the Ohio Office of Consumer Counsel (at page 40) that the Act does not suggest, nor does it require, the imposition of an imputation rule on the states to ensure that the sum of the unbundled network elements be no greater than retail rates, as suggested at paragraph 184 of the NPRM. The example used by the Commission in paragraph 185 assumes that the retail local rate is below cost, necessitating the Commission to price unbundled elements below cost in contravention of the pricing standard of Section 252(d)(1) (or that the Commission preempt the states and set local service rates above "cost").

JCA maintain that the Commission does not have legal authority to require either result. We agree with NASUCA, NARUC, and others that Section 152(b) prohibits the Commission from setting local rates. Further, the Commission may not price unbundled elements below cost. That would violate Section 252(d)(1).

More importantly, JCA take issue with the implication in the example set forth in paragraph 185 that basic local service is subsidized. The example assumes the cost of basic residential service is $25.00, assuming a $20.00 loop cost and a $5.00 port cost, and it further assumes that the retail local rate is $10.00. This example assumes that the loop is a direct cost of local service, when it is well-established and accepted that the loop is a joint cost.

Local exchange companies have been using the subsidy argument for years. This argument cannot be sustained unless one accepts the erroneous assumption that 100 percent of the shared cost of the loop is a sole cost of local service. A proper incremental cost study does not include shared costs, and thus, when evidence is properly presented, it cannot be established that local service is priced below cost. This fact was recently recognized by the Washington Utility and Transportation Commission in US WEST.

Imputation, in this instance, is not appropriate because retail local service is not equivalent to the unbundled loop and port element. This fact has been recognized in the comments of CPI (p. 27), Ameritech (p. 101), and NCTA (p. 57). Because the loop is a joint cost, it cannot be assigned in its entirety to basic local service. The LECs have many revenue sources which help recover joint costs, including toll, switched access, and custom calling. There is no reason why competitive local carriers will be unable to draw upon these same revenue sources in order to pay their loop costs and compete with the incumbent LECs. The loop facilities used in providing local exchange service are also required for (and used by) other services that both the incumbent and competitive local carriers will continue to provide, including interstate switched access, intrastate switched access, interstate toll, custom calling, and caller identification service. The poles, cable, drop wire, line card, and channel connection are equally required for the provision of these other services, and there is no reason to impose the entirety of these costs on just one of the services benefiting them.

Imputation cannot logically be applied in this instance because the unbundled loop is not comparable to the basic local exchange rate. Consideration must also be given to the other revenue sources which are used by carriers to recover their loop costs. Indeed, the Commission appears to recognize this point at paragraph 186 of the NPRM:

> Under these circumstances, it could be argued that no imputation rule is needed to protect new entrants because, as a matter of market economics or legal obligations, new entrants purchasing unbundled elements priced at cost would be providing all of these services, and thus could collect the same relatively overpriced revenues for toll service, interstate access, vertical features, and other offerings to make up for the underpricing of basic *residential local exchange* service.

JCA take issue with the erroneous assumption that residential local service is "underpriced." Indeed, the Commission does recognize that the shared loop does have numerous revenue sources.

Finally, JCA note that the $20.00 local loop cost set forth in the NPRM example appears to be derived from the benchmark cost model. That model purports to calculate the economic cost of loops, but JCA believe that the benchmark cost model overstates loop costs. Testimony presented by the Pennsylvania Consumer Advocate in a recent case in Pennsylvania, using Pennsylvania data, suggests that the economic cost of local loops is most likely far less than the $20.00 example used in the NPRM. This is because the BCM develops an average cost of providing service, rather than using an incremental approach.

VIII. BILL AND KEEP FOR RECIPROCAL COMPENSATION SHOULD BE REQUIRED ON AN INTERIM BASIS AT LEAST UNTIL THE DATA CAN BE DEVELOPED TO DETERMINE TRAFFIC AND REVENUE FLOWS BETWEEN CARRIERS.

JCA agree with the interexchange carriers and others that carriers should compensate each other for termination of calls on each other's networks by bill and keep. We believe this is a reasonable solution for an interim period of time. It seems that there is considerable doubt that there is any mechanism available to the new entrants for measuring local traffic, and thus the development of such a mechanism may delay competition. We believe that an interim period is appropriate, at least until data can be developed to determine whether traffic and revenue flows between the carriers requires the elimination of a bill and keep arrangement and the substitution of a termination charge between the carriers. The telephone industry has commonly used bill and keep for compensation between connecting LECs for many years.

IX. THE INCUMBENT LECs DO NOT HAVE A CONSTITUTIONAL ENTITLEMENT TO RECOVER STRANDED EMBEDDED COSTS.

Although most incumbent LECs agree that economic costs should be the starting point for pricing network elements and interconnection agreements, all are firm in their position that they are entitled to recover their embedded costs. In support of their position, Bell Atlantic and US WEST claim that they are constitutionally entitled to recover all embedded costs. However, US WEST (at page 33) concedes that in a competitive marketplace, a guarantee of profitability "will no longer be meaningful," and Sprint recognizes that regulation does not guarantee complete cost recovery. Sprint has also recognized that the return provided under regulation reflects business risk, and the bulk of embedded (stranded) costs is the product of management decision. Therefore, Sprint argues that the business must bear responsibility for its actions and suggests that if competition becomes meaningful, the local exchange companies may write down some of their embedded (stranded) costs. II Bd(3)(c).

The Commission should explicitly reject the LECs claim to stranded cost recovery as a matter of right. Utilities are not entitled to recover costs that have become uneconomic due to competitive pressure. A requirement for recovery would result in excessive rates and would violate existing case law regarding the recovery of prudently incurred costs rendered uneconomic for various reasons.

JCA reject the view that utilities have a constitutional right that guarantees them a return on, and recovery of, every dollar of prudent investment.[1] Regulatory agencies and the appellate courts have long recognized that, even where an investment was prudent when made, such an investment may be excluded from rates in whole or in part where it is not currently used and useful in serving ratepayers. As stated by the D.C. Circuit Court of Appeals in upholding the FERC's refusal to grant a return on a utility's admittedly prudent abandoned generating plant in NEPCO Mun. Rate Com. v. FERC, 668 F.2d 1327, 1333 (D.C. Cir. 1981):

> NEP says capital prudently invested in a generating facility is taken for public use and therefore must be included in the rate base.
>
> ***
>
> The general rule recognized by this court is that expenditure for an item may be included in a public utility's rate base only when the item is "used and useful" in providing service; that is, current rate payers should bear only legitimate costs of providing service to them.

[1]JCA would note that the state of Delaware does not use a prudency standard.

More recently, in requiring FERC to hold a hearing on whether the application of the used and useful policy would jeopardize the "financial integrity" of the utility, the D.C. Circuit, in an en banc opinion by Judge Bork, held that:

> Under Hope. as we have stated repeatedly, the only circumstance under which there is a possibility of a taking of investors' property by virtue of rate regulation is when a utility is in the sort of financial difficulty described in Justice Douglas' opinion. ... But absent that sort of deep financial hardship described in Hope, there is no taking, and hence no obligation to compensate, just because a prudent investment has failed and produced no return.

Jersey Central Power & Light Co. v. FERC, 810 F.2d 1168, 1181 n.3 (D.C. Cir. 1987). Perhaps even more relevant here is the discussion of the interplay between the prudence and the used and useful standard in the concurring opinion of Judge Starr in the Jersey Central case. Judge Starr wrote:

> Prudence is, of course, relevant to the process of striking a reasonable balance in rate-setting for public utilities. Requiring an investment to be prudent when made is one safeguard imposed by regulatory authorities upon the regulated business for benefit of ratepayers. As I see it, the "used and useful" rule is another such safeguard. The prudence rule looks to the time of investment, whereas the "used and useful" rule looks toward a later time. The two principles are designed to assure that the ratepayers whose property might otherwise be "taken" by regulatory authorities, will not necessarily be saddled with the results of management's defalcations or mistakes, or as a matter of simple justice, be required to pay for that which provides ratepayers with no discernible benefit.

Id. at 1190 (footnote omitted). Judge Starr further noted that:

> The obvious danger in not examining both ends of the continuum--both the prudence of the investment and whether the end result of the investment was used and useful--is to build in pressures for building excess generating capacity. The "used and useful" rule operates